A

ISIDRO LEONARDO QUITO CRUZ

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
C SULONG MATJERAIE FCJ
[CRIMINAL APPEAL NO: 05-75-2011(B)]
9 JANUARY 2013

D ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B - Trafficking in 790.6g cocaine - Accused detained at airport after passing through Immigration checkpoint - X-ray examination of appellant's abdomen revealed presence of objects confirmed to contain dangerous drugs - Defence of - Appellant denied drugs was to be trafficked to Malaysia as he was 'in transit' to Phuket - Whether foreigner in possession of large*
E *quantity of drugs anywhere on Malaysian territory liable to be charged for drug trafficking - Whether s. 21(6) Dangerous Drugs Act 1952 applicable*

F The appellant, a Peruvian, who was detained at the Kuala Lumpur International Airport ('KLIA') on arrival from Buenos Aires *en route* to Phuket, was found guilty by the High Court of trafficking in 790.6g cocaine. The facts showed that after arriving at KLIA, the appellant passed through the Immigration checkpoint where his passport was stamped granting him a 90-day social visit
G pass to stay in Malaysia. When he emerged from the Immigration counter, he was detained by a policeman who took him to the KLIA police station for a report to be made and then to the Serdang Hospital where an x-ray examination of the appellant's abdomen showed the presence of several oblong objects in his
H bowels. The appellant was admitted to the hospital and given medication to purge the objects out. Over the next five days, he passed out 141 pellets containing a total of 790.6g cocaine. On finding the appellant to have been in possession of the drugs, the trial judge invoked the presumption of trafficking under
I s. 37(da)(ix) of the Dangerous Drugs Act 1952 ('DDA') and called on the appellant to enter his defence. The appellant admitted that he had swallowed the drugs but denied that they were to be trafficked into Malaysia. He claimed that after he was given a boarding pass to Phuket at the transit section in KLIA,

he went to the Immigration counter to enquire about a flight change when a policeman seized his passport and gave it to the Immigration officer. The trial judge rejected the appellant's defence as an afterthought and found that he had failed to rebut the presumption of trafficking and also to raise a reasonable doubt on the prosecution's case. The Court of Appeal upheld the High Court's finding of guilt and ruled that the drugs in the appellant's possession were not 'in transit' as was expounded in the case of *PP v. Jorge Enrique Pellon Tellon* ('*Tellon*'s case') and that they did not come under Part V of the DDA which concerned the import and export of dangerous drugs for legitimate purposes. In his appeal to the Federal Court, the appellant's main argument was that he was in transit at the KLIA and he had not intended to enter Malaysia nor distribute the drugs within Malaysia. Hence, he should not have been charged with drug trafficking under s. 39B DDA but only for an offence of being in possession of drugs while in transit under s. 21(6) of the DDA, which fell under Part V of the DDA. It was the trial court's finding, affirmed by the Court of Appeal, that the appellant was arrested after he went through the Immigration checkpoint and that he had failed to challenge the prosecution's evidence that he had voluntarily entered Malaysia.

Held (dismissing appeal; affirming conviction and sentence) Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) The 'in transit' defence of the nature held in *Tellon*'s case should no longer be accepted as a valid defence for a charge of trafficking under s. 39B of the DDA. If this defence were accepted, then incoming foreigner drug traffickers who stood before or at the Immigration checkpoints at KLIA would be immune from any criminal liability under s. 39B DDA, a situation surely not envisaged when Part V of the DDA was promulgated. (para 32)

(2) Part V of the DDA was specifically intended for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes as provided under the Single Convention on Narcotic Drugs 1961 and it had no application to the instant case. (paras 19 & 21)

(3) Drug trafficking may occur anywhere on Malaysian soil where its criminal jurisdiction extends. It may be committed at the airport, either before or after an Immigration checkpoint, or on a ship or on board an aircraft lying within her territory.

A Malaysia could claim criminal jurisdiction on any offender who committed that offence in any of the said places, it being a crime within her territory. (para 29)

(4) The appellant in this case was clearly on Malaysian soil. Even
B if he had not alighted from the aircraft parked at KLIA, he would still have been in Malaysia and subject to her criminal laws. (para 30)

(5) To accept the defence that the appellant could only be guilty of an offence under s. 21(6) of the DDA since he was only
C 'in transit' at KLIA was a ridiculous proposition. It would mean that a foreigner drug trafficker who stood beyond the Immigration checkpoint at an airport, prior to official entry being granted to him, would be immune from s. 39B of the DDA offence, but that the same crime would have been
D committed by a Malaysian found in that same location. The appellant here knew he had to enter Malaysia to take a connecting flight to Phuket. The offence was complete once he was on Malaysian soil. The 'in transit' plea was irrelevant and a red herring to answer the s. 39B DDA charge. (para 31)

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(6) The Court of Appeal in *Tellon*'s case reasoned that the presumption of trafficking could not arise as the drugs 'in transit' was not meant to be 'distributed and consumed' in Malaysia. The 'distribution and consumption' qualification in
F *Tellon*'s case was unsuitably applied in the context of an offence of trafficking under s. 39B of the DDA. Trafficking did not necessarily involve the components of 'distribution or consumption'. An offence under s. 39B of the DDA was proven when the court was satisfied beyond reasonable doubt
G that the offender was in possession of dangerous drugs. With proof of care and custody being the pre-requisites, and once this minimal element was proved and the operation of the presumption under s. 37(da) of the DDA triggered, the offence of trafficking would be established. (paras 23 & 28)

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(7) There was indisputable and direct evidence that the appellant was in possession of the drugs in question. He admitted to swallowing them. It was not the appellant's defence that the drugs were for his own consumption. The large amount of
I drugs involved raised a strong inference that it was not for his personal consumption. (paras 24 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang rakyat Peru yang ditahan di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') sebaik tiba dari Buenos Aires dalam perjalanan ke Phuket, didapati bersalah oleh Mahkamah Tinggi kerana mengedar 790.6g kokain. Fakta menunjukkan bahawa sebaik tiba di KLIA, perayu telah melalui tempat pemeriksaan Imigresen di mana pasportnya distamp dengan pas lawatan sosial bagi membolehkannya berada di Malaysia selama 90 hari. Perayu bagaimanapun ditahan oleh seorang anggota polis ketika keluar dari kaunter Imigresen dan dibawa ke balai polis KLIA di mana satu laporan polis dibuat. Perayu kemudian dibawa ke Hospital Serdang di mana, ekoran dari pemeriksaan x-ray yang diadakan, beberapa objek berbentuk bujur didapati berada dalam perutnya. Perayu kemudian dimasukkan ke wad hospital dan diberikan ubat bagi mengeluarkan objek-objek berkenaan, dan untuk lima hari berikutnya, perayu telah mengeluarkan 141 pelet yang mengandungi 790.6g kokain. Semasa mendapati perayu mempunyai milikan dadah tersebut, yang arif hakim telah menggunapakai anggapan pengedaran di bawah s. 37(da)(ix) Akta Dadah Berbahaya 1952 ('ADB'), sekaligus memanggil perayu untuk membela dirinya. Perayu mengakui bahawa beliau telah menelan dadah, tetapi menafikan bahawa beliau hendak mengedarkan dadah tersebut di Malaysia. Menurut perayu, selepas beliau diberikan boarding pass ke Phuket di bahagian transit KLIA, beliau pergi ke kaunter Imigresen untuk bertanya mengenai pertukaran penerbangan, dan di situ seorang anggota polis telah merampas pasport beliau dan menyerahkannya kepada pegawai Imigresen. Hakim bicara menolak pembelaan perayu sebagai suatu rekaan kemudian dan mendapati perayu gagal menyangkal anggapan pengedaran atau membangkitkan keraguan munasabah terhadap kes pendakwaan. Mahkamah Rayuan mengesahkan sabitan yang dibuat oleh Mahkamah Tinggi dan memutuskan bahawa dadah yang berada dalam milikan perayu bukanlah berada 'di dalam transit' seperti yang diputuskan di dalam kes *PP v. Jorge Enrique Pellon Tellon* ('kes *Tellon*'), dan bahawa ia juga tidak dirangkumi oleh Bahagian V ADB yang berkaitan dengan pengimportan dan pengeksportan dadah berbahaya untuk tujuan-tujuan yang sah. Dalam rayuannya ke Mahkamah Persekutuan, hujah utama perayu adalah bahawa beliau berada dalam transit di KLIA dan tidak berniat untuk memasuki Malaysia atau mengedarkan dadah di Malaysia, dan oleh itu, beliau sepatutnya dituduh di bawah

A s. 21(6) ADB iaitu kerana memiliki dadah berbahaya semasa dalam transit, yang termasuk di bawah Bahagian V ADB, tidak dengan kesalahan di bawah s. 39B ADB. Adalah dapatan mahkamah bicara, yang disahkan oleh Mahkamah Rayuan, bahawa perayu ditangkap selepas melepasi pemeriksaan Imigresen dan bahawa
B beliau gagal mencabar keterangan pendakwaan yang beliau telah memasuki Malaysia secara sukarela.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)

C **Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:**

(1) Pembelaan 'di dalam transit' seperti yang diputuskan oleh kes *Tellon* tidak lagi harus diterima sebagai satu pembelaan sah bagi pertuduhan pengedaran di bawah s. 39B ADB. Jika pembelaan
D ini diterima, bermakna pengedar dadah orang asing yang berdiri di hadapan tempat pemeriksaan Imigresen di KLIA adalah kebal daripada sebarang liabiliti jenayah di bawah s. 39B ADB. Keadaan ini tentunya tidak dibayangkan semasa Bahagian V ADB digubal.

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(2) Bahagian V ADB adalah ditujukan khusus kepada mengawalselia pengimportan dan pengeksportan dadah berbahaya untuk maksud-maksud yang sah sepertimana yang diperuntukkan di bawah Single Convention on Narcotic Drugs 1961, dan tidak
F terpakai kepada kes semasa.

(3) Pengedaran dadah boleh berlaku di mana-mana sahaja di bumi Malaysia yang terangkum di bawah bidang kuasa jenayahnya. Ia boleh dilakukan di lapangan terbang, sama ada sebelum
G atau selepas pemeriksaan Imigresen, atau di atas kapal atau di dalam pesawat yang berada dalam wilayahnya. Malaysia boleh menuntut bidang kuasa jenayah terhadap mana-mana pesalah yang melakukan kesalahan di mana-mana tempat tersebut, kerana ia adalah jenayah yang dilakukan dalam wilayahnya.

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(4) Perayu dalam kes ini jelas berada di bumi Malaysia. Biarpun beliau tidak mendarat dari pesawat yang diparkir di KLIA, beliau masih tetap berada di Malaysia dan tertakluk kepada undang-undang jenayahnya.

I **(5)** Adalah tidak masuk akal untuk menerima pembelaan bahawa perayu hanya boleh didapati bersalah melakukan kesalahan di bawah s. 21(6) ADB kerana beliau berada 'di dalam transit' di KLIA. Menerima saranan ini bermakna bahawa seorang pengedar dadah orang asing yang berdiri di belakang tempat

pemeriksaan Imigresen di lapangan terbang, sebelum kebenaran masuk rasmi diberi kepadanya, adalah kebal daripada kesalahan di bawah s. 39B ADB, sementara pengedar dadah rakyat Malaysia akan melakukan kesalahan tersebut jika berada di tempat yang sama. Perayu di sini mengetahui bahawa beliau perlu memasuki Malaysia sebelum mengambil penerbangan sambungan ke Phuket. Kesalahan menjadi sempurna sebaik beliau menjejakkan kaki di bumi Malaysia. Maka pli 'di dalam transit' adalah tidak relevan dan hanya merupakan helah untuk mengelak dari s. 39B ADB.

(6) Mahkamah Rayuan dalam kes *Tellon* mentaakulkan bahawa anggapan pengedaran tidak boleh berbangkit kerana dadah yang 'di dalam transit' tidak dimaksudkan untuk 'diedar dan digunakan' di Malaysia. Syarat 'pengedaran dan penggunaan' dalam kes *Tellon* telah digunapakai secara tidak sesuai di dalam konteks suatu kesalahan pengedaran di bawah s. 39B ADB. Pengedaran tidak semestinya melibatkan unsur-unsur 'pengedaran atau penggunaan'. Suatu kesalahan di bawah s. 39B ADB dibuktikan apabila mahkamah berpuas hati di luar keraguan munasabah bahawa pesalah mempunyai milikan dadah berbahaya. Dengan bukti jagaan dan kawalan sebagai syarat duluan, dan sebaik sahaja elemen minima ini dibuktikan dan operasi anggapan di bawah s. 37(da) ADB terbingkas, maka suatu kesalahan pengedaran telah dibuktikan.

(7) Dalam kes ini, terdapat keterangan terus dan yang tidak boleh disangkal bahawa perayu mempunyai milikan dadah berkenaan. Beliau mengakui menelan dadah-dadah tersebut. Bukanlah menjadi pembelaan perayu bahawa dadah adalah untuk kegunaannya sendiri. Jumlah besar dadah yang terlibat membangkitkan inferens yang kuat bahawa ianya bukan untuk kegunaan beliau sendiri.

Case(s) referred to:

Antonio Dias Caldeira v. Frederick Augustus Gray [1934] 1 LNS 5 ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Koh Tiong Hock v. PP [2011] 2 CLJ 377 CA ***(foll)***

Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***

Lim Geak Liang v. East West UMI Insurance Bhd [1997] 4 CLJ 405 FC ***(refd)***

Low Kian Boon & Anor v. PP [2010] 5 CLJ 489 FC ***(refd)***

Ng Kwok Chun & Anor v. PP [1993] 1 SLR 55 ***(refd)***

Ong Lock Soon v. PP [2006] 8 CLJ 482 HC ***(foll)***

PP v. Jorge Enrique Pellon Tellon [1998] 4 CLJ 278 CA ***(ovrd)***

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 21(6), 37(d), (da)(ix), 39B

For the appellant - Edmund Bon Tai Soon (Chan Yen Hui with him); M/s Chooi & Co
For the respondent - Mohamad Abazafree Mohd Abbas; DPP

Reported by Ashok Kumar

JUDGMENT

Abdull Hamid Embong FCJ:

[1] The appellant, a Peruvian, arrived at the Kuala Lumpur International Airport on 10 October 2006, *en route* from Buenos Aires to Phuket. Upon arrival at KLIA, the appellant went to Gate H to take a Malaysia Airline flight to Phuket, scheduled at 6.10pm. He then passed through the immigration checkpoint counter. An immigration officer on duty (PW19) stamped his passport, granting him a social pass which allowed the appellant to stay in Malaysia for 90 days. PW19 also stamped the immigration Form 26 and handed it over to the appellant. When he emerged from the immigration counter, Inspector Basri Husain (PW4), who was on surveillance duty at the KLIA, approached the appellant and introduced himself as a police officer. A quick body search on the appellant showed he was not carrying any contraband. The appellant was then brought to the KLIA Police Station where a police report was made.

[2] The appellant was later brought to the Serdang Hospital where an x-ray examination was done on his abdomen. His bowel was detected to be filled with foreign bodies, oblong in shape.

[3] The appellant was then warded in ward 6C of the hospital. Medication was given to him to induce bowel movements. This resulted in the appellant, in the following five days, discharging out a total of 141 pellets suspected to be dangerous drugs. Upon analysis by the Chemistry Department, the pellets were found to contain 790.6g of cocaine, (the said drugs) now the subject of the charge against him.

[4] The trial judge found the appellant to be in possession of the said drugs and invoked the presumption under s. 37(da)(ix) Dangerous Drugs Act 1952 (DDA) to call upon him to enter his defence.

The Defence

[5] The appellant said that upon arrival at KLIA he went to the transit section, where upon presenting his airline ticket he was given a boarding pass to Phuket, to depart from Gate H. He then went to the information counter to change his flight to an earlier one but found it unmanned. He then went to the immigration counter to make enquires about a change in his flight schedule. He spoke in Spanish but was not understood. Then he saw two persons beyond the immigration counter, one of whom waved at him. These two persons were policemen. At the immigration counter, his passport was seized by a policeman and given to the immigration officer. He said that he passed through the immigration checkpoint because he thought that the person who waved at him was there to help him.

[6] The appellant admitted that he had swallowed the said drugs, found in his bowel, but denied that they were to be trafficked into Malaysia.

[7] The learned trial judge found that the appellant had failed to rebut the s. 37(da) presumption, rejected his defence as an afterthought and found that he had failed to raise a reasonable doubt on the prosecution's case.

[8] The Court of Appeal affirmed the finding of guilt by the learned trial judge and opined that the said drugs were clearly not in transit as expounded in the case of *PP v. Jorge Enrique Pellon Tellon* [1998] 4 CLJ 278 and that Part V of the DDA is intended only for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes. As such the carrying of the said drugs in this case is not covered by the 'in transit provisions under Part V' of the DDA, including s. 21(6).

[9] Before us, learned counsel for the appellant submitted that there had been a break in the chain of the prosecution's evidence. The thrust of the submission on this gap issue, according to learned counsel goes to the identity of the said drugs itself. Learned counsel contended that there had been a failure by the primary witnesses who recovered the pellets from the appellant, to properly identify the 11 pellets discharged by the appellant on 11 October 2006, the 17 pellets discharged on 12 October 2006, the 21 pellets discharged by the appellant on 13 October 2006, the 11 pellets on 14 October 2006, and the four pellets discharged on 15 October 2006. All these pellets were handed over to PW17 who marked the pellets and lodged separate police

A reports upon their recovery. It was submitted that the identification of these pellets were doubtful since PW7, PW11, PW12, PW13, PW15 and PW16 who respectively recovered the pellets from the appellants had not marked the plastic bags into which those pellets were put to be handed over to PW17. B Further, these witnesses themselves had failed to lodge their own police reports on the recovery of those pellets. These flaws, it was submitted resulted in a serious doubt as to the identity of the exhibits, thus nullifying any *prima facie* case. *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168; [1992] 1 MLJ C 322 was cited as authority in support of this proposition.

[10] The next issue was on the failure of the arresting officer (PW4) to produce a search and seizure list after the appellant was arrested at the KLIA arrival hall. A total of 12 personal items belonging to the appellant were seized by PW4 who handed them D over to PW17. But no search list on those items were tendered. The evidence showed that PW17 was together with PW4 when a body search was conducted on the appellant. In his testimony PW17 identified only 11 of the 12 items recovered by PW4 from the search. One item ie, the boarding pass issued by MAS from E Argentina (exh. P34) was not identified by PW17 when he gave evidence. Also not identified was a piece of paper bearing the name of a hotel in Phuket which was recovered from the appellant's wallet (exh. P31).

F **[11]** The above issues concern primarily the findings of fact by the learned trial judge, which findings had not been questioned by the appellant on appeal, and as such, must be taken as non-issues at the appellate stage. We have considered the findings of the learned trial judge who stated that he had fully evaluated the G evidence as adduced by the prosecution on a maximum scale and found that the prosecution had succeeded in proving a *prima facie* case against the appellant when he was found to be in actual possession of the drugs in question and had knowledge of them. We found that there could not have been any question of H doubtful identity of those drugs since the appellant himself had admitted to swallowing them. The flaws to the prosecution case, as submitted by learned counsel must be taken as having been totally evaluated by the learned trial judge when he made a finding of a *prima facie* case against the appellant. In any event, we are I of the view that those so-called flaws had in no way vitiated the prosecution case at that *prima facie* stage. The drugs were also specially packed in small plastic pellets and were discharged from the body of the appellant himself. There could not be in our opinion any doubt on their identity.

The 'In Transit' Defence

[12] The principal defence emphatically argued before us, and in the courts below, was that the appellant was in transit at the KLIA. He had not intended to enter the country and as such could not have committed an offence for which he was charged *viz* trafficking under s. 39B DDA. Instead, and at best, he could only be guilty of an offence under s. 21(6) of the DDA. It was submitted that the appellant did not want to enter Malaysia and was called to pass through the immigration checkpoint by the police. It was also submitted that there was no evidence that he intended to distribute the drugs within Malaysia. It was not meant for consumption within Malaysia and that it was purely meant to be transported to Phuket. The Court of Appeal's decision in *Tellon*'s case was heavily relied upon in support for an alternative conviction under s. 21(6) DDA.

[13] It was the finding of facts of the courts below that the appellant was arrested when he emerged out of the immigration checkpoint counter. It was also a finding of fact that the appellant was granted a social visit permit to stay in Malaysia for 90 days and that all the relevant documents for his entry had been duly inspected and stamped by the immigration authority prior to his entry into Malaysia. The appellant himself did not deny walking pass the immigration checkpoint. The only dispute was that he had no intention to do so but had merely walked over to the policeman (PW4) under the belief that PW4 could assist him with his enquiries.

[14] We reproduce below this relevant passage from the findings of the Court of Appeal:

> Having considered Isidro's evidence and upon testing it with PW4's, PW17's and PW19's evidence, the learned trial judge concluded Isidro's defence to be an afterthought, and that Isidro's evidence failed to raise any reasonable doubt in the prosecution's case. The learned trial judge accepted PW19 as a witness of truth whose evidence proved the sequence of events leading to his stamping of P23 and P27 with the Immigration social visit pass stamp and then returning the same to Isidro. This is what the learned judge said in his judgment:
>
> > The evidence of the Immigration Officer SP19 that it was the accused who handed the passport P23, the disembarkation card P27 and he stamped the visit pass for 90 days on the accused passport was never challenged by

A the defence during the prosecution stage nor did the defence suggest to SP19 that it was the police who handed the passport to him. More importantly the defence never at any time suggested to the prosecution's witnesses SP4 and SP17 that it was the police and not the accused that handed over the passport to the Immigration officer. The evidence aforesaid to my mind negated the defence counsel's contention that he was not on Malaysian soil. On this score I find that SP19 is a witness of truth who testified as to the sequence of events leading to his impressing the Immigration visit pass stamp on the accused's passport. His evidence is not only consistent but credible. SP19 to my mind has no interest or motive to frame up the accused. The accused testimony that he did not realize that by crossing through the Immigration counter he is on Malaysian soil to my mind is a mere denial and in any event ignorance of the law does not and cannot rebut the statutory presumption arising under section 37(da) of the Act.

We agree with his conclusion. In considering P27 we have not lost sight of learned counsel's contention that the arrival portion (which was not produced) if produced would show that Isidro's version of the events on the day in question might have been true. We are unable to accept that contention. There is no evidence to show that that document was withheld or suppressed by the prosecution. In his evidence, PW19 explained that there were two portions to the Imm. 26 Form (P27) – the arrival and the departure portions. PW19 said the arrival portion was kept by the immigration, and the departure portion was put in the passport to be submitted to the immigration when the passport holder was to depart from Malaysia. Elaborating on the arrival portion, under cross-examination PW19 said he did not have it with him as it had been sent to and kept at the Immigration Headquarters, Putrajaya. The investigation officer (PW25) wrote to the Director General of the Immigration on 7 July 2009 (P72) to obtain the arrival portion, but was informed that it could not be found. PW25 was informed that the arrival portion would be disposed of three months after the date of arrival. That evidence by PW25 was not challenged by the defence. In the light of PW19's, PW4's and PW17's evidence as well as Isidro's own admission that he filled in P27 in his own handwriting, we could not see how the arrival portion would show that Isidro's version might have been true or raise a reasonable doubt in the prosecution's case. (per Ahmad Haji Maarop, then JCA)

[15] Again we say that these are findings of facts which are not erroneous. The trial judge had come to his findings after assessing the demeanour of the appellant whom he found not to be illiterate or ignorant of the English language as to be utterly unaware of what he was then doing. Also the evidence of PW19, who stamped the appellant's document was not challenged under cross-examination to create any doubt in the prosecution version that the appellant has voluntarily entered the country. These findings of fact and the credibility of the appellant are all matters within the volition and good judgment of a trial judge to which an appellate court, without that audio-visual advantage during a trial, ought to give its utmost respect. (see *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101).

[16] The Federal Court too does not make its own findings of fact. (see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457). The function of this court, at this final stage of appeal in dealing with the findings of fact by the courts below is now limited in its scope, confined to the advice of the Privy Council in this passage from *Antonio Dias Caldeira v. Frederick Augustus Gray* [1934] 1 LNS 5; [1936] MLJ 137, 138 which says:

> … that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trust-worthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but must be convinced that it is wrong.
>
> Now, it settled law that it is no part of the function of an appellate court in a criminal case or indeed any case to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.
>
> This case, it must be underlined, raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts.

There is also the now trite principle that this court will not interfere with any concurrent findings of fact by both the trial court and the intermediate appellate court. Unless there is a plain

A and overriding error which affected their assessment of facts. (see *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 4 CLJ 405; [1997] 3 MLJ 517. Also, *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489).

B **[17]** In *Tellon*, the appellant who was initially charged with two offences under s. 39B of the DDA was convicted on a court-amended charge under s. 21(6) DDA for bringing into Malaysia dangerous drugs "in transit otherwise than in accordance with the provisions of this section". The Court of Appeal in that case C opined that when "a dangerous drug is in transit, the amount is irrelevant because it is completely a different kind of act and therefore a different kind of offence".

[18] Learned counsel for the appellant submitted that since the D facts in this case are similar to that of *Tellon*'s case, the appellant should, at the most, be convicted for an offence under s. 21(6) DDA. It was also submitted that the Court of Appeal had been wrong to follow the decision of *Ong Lock Soon v. PP* [2006] 8 CLJ 482; [2012] 2 MLJ 641) in deciding that s. 21(6) DDA is E intended only for the purpose of governing the importation of dangerous drugs for legitimate purposes (namely medical and scientific purposes as provided under the Single Convention on Narcotic Drugs 1961.)

[19] We agree with the Court of Appeal in the instant appeal F which adopted the reasoning of the decision in *Ong Lock Soon* that Part V of the DDA is specifically intended for the purpose of governing the importation and exportation of dangerous drugs for legitimate purposes as provided under the Single Convention of Narcotic Drugs 1961. Reference to the Hansard was made by the G court in *Ong Lock Soon* in analysing the intent of Part V, particularly to the speech of the Minister of Health who presented the Bill in Parliament. The Single Convention 1961 is an international convention whose aim, *inter alia* is to "restrict the use of narcotic drugs to medical and scientific purposes and to prevent H their diversion and abuse, while at the same time ensuring their availability for legitimate purposes". Part V DDA was thus introduced to regulate and control the entry and exit of such dangerous drugs for legitimate purposes.

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[20] In *Ong Lock Soon*, the Court of Appeal made the following observation in respect of the 'in transit' defence raised by the appellant in that case, and we quote:

> … In other words regarding the specific defence ventilated before us, we are of the view that the provisions relating to dangerous drugs in transit under Part V of the DDA are intended to apply to dangerous drugs in transit for legitimate purposes. Even if Ong's evidence is accepted, the bringing of the proscribed drugs into Malaysia for the purpose of being carried to Australia by Ong for the use of Huan Choo's relative was not covered by the transit provisions under Part V of the DDA including section 21(6). The acceptance of learned counsel's contention would result in Malaysia being a very attractive and potentially safe transit haven for drug traffickers from all over the world. Such a consequence is to our mind absurd, contrary to international comity and certainly never intended by the legislature.

[21] In our view, Part V of the DDA has no application to this case. The appellant is charged with trafficking in dangerous drugs under s. 39B of the DDA. It is to that section that this case must be looked at.

[22] Section 39B DDA was inserted *vide* Act A293, an amendment made on 30 April 1975. The definition of trafficking was inserted *vide* Act A390 which took effect on 18 March 1977.

[23] In *Tellon*, the Court of Appeal, in confirming a conviction under s. 21(6) DDA gave the following reasons:

> As we have earlier observed that the meaning of being "in transit' is for the 'sole purpose' of being carried to another country and therefore Malaysia will not be a country where the drug will be **distributed and consumed** and as such the presumption of trafficking cannot arise (emphasis added).

With utmost respect, we are of the view that the distribution and consumption qualification was unsuitably applied in the context of an offence of trafficking under s. 39B DDA. The key-word "traffic" there does not involve the components of "distribution or consumption". A person who is found to be in control and custody of dangerous drugs is deemed to be in possession if the presumption under s. 37(d) is invoked and to have known the nature of such drug (s. 37(d) DDA). Alternatively, once the prosecution has succeeded in proving by direct evidence and thus,

on a finding of fact, that a person is in possession of a certain amount of dangerous drugs as listed under s. 37(da), he is in law presumed to be trafficking in that said drug, *albeit* without any intention for its distribution or consumption.

[24] In this case, there was indisputable and direct evidence that the appellant was in possession of the said drugs in question. He even admitted to swallowing them. The learned trial judge made a positive finding that he was in possession of the drugs. We think that the learned judge had no other option in the face of this damaging evidence. At the end of the trial, it was the learned trial judge's finding that the appellant had failed to rebut the statutory presumption under s. 37(da)(ix) now triggered against him, on a balance of probability.

[25] Also, by the very definition of trafficking under s. 2 DDA, the appellant had been proven as a fact, to have trafficked in the said drugs by way of importing them into Malaysia. That act alone implies that he had trafficked in the said drugs, regardless of whether he achieved the purpose of that act of importation. Section 2 defines trafficking as follows:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act of the regulations made under the Act.

[26] We are in agreement with the reasoning of the Court of Appeal in the case of *Koh Tiong Hock v. PP* [2011] 2 CLJ 377 when considering the effect of the word "exporting" under s. 2 DDA. The rationale can be similarly applied to the act of importing. The Court of Appeal said:

> Be that as it may, whether the proscribed drug was intended for distribution outside the country is totally irrelevant to the offence of trafficking under the DDA. The inclusion of the word 'exporting' as an act of trafficking in the definition of 'trafficking' in s. 2 clearly puts distribution abroad within the contemplation of the law. Secondly, the gravamen of the charge is not the act of distributing the drug but the act of transporting the proscribed drug for the purpose of distribution, irrespective of whether the purpose is achieved and irrespective of whether the intended distribution is within the country or abroad. As submitted by the

learned deputy the intention of the DDA is to encompass both drugs brought into and out of the country. The reference to the purpose for which the drug is being transported was made by the Privy Council in *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181 solely to draw a distinction between the offence of mere possession and that of trafficking as the law provides a far heavier punishment for the latter. As stated in the Singapore case of *Lau Chi Sing v. PP* [1988] 1 LNS 187, the offence is completed once there is the act of transportation so long as its purpose is to transfer possession for some other person in contradistinction to an intention to keep the drug solely for one's own consumption. Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking.

[27] In this case, it was not the defence of the appellant that the drugs he trafficked in was for his own consumption. Furthermore the large amount involved (790.6g) raises a strong inference that it was not for his personal consumption (*Ong Ah Chuan*'s case).

[28] An offence under s. 39B DDA is proven when the court is satisfied beyond a reasonable doubt that the offender was in possession of dangerous drugs. With proof of care and custody being the pre-requisites, and once this minimal element is proven and the operation of the presumption under s. 37(da) is triggered, the offence of trafficking would be established.

[29] Trafficking of drugs may occur anywhere on Malaysian soil, where its criminal jurisdiction extends. It may be committed at an airport, either before or after an immigration checkpoint or on a ship or on board of an aircraft lying within her territory. Malaysia can claim criminal jurisdiction on any offender who commits that offence in any of the said places, it being a crime within her territory.

[30] The appellant in this case was clearly on Malaysian soil. Even if he had not alighted from the aircraft, now parked at KLIA, he would still be in Malaysia and subject to her criminal laws.

[31] To accept the defence that the appellant can only be guilty of an offence under s. 21(6) DDA since he was only 'in transit' at KLIA would be a ridiculous proposition. It would mean that a foreigner drug trafficker who stood beyond an immigration checkpoint at an airport, prior to official entry being granted to him, is immuned from the offence under s. 39B DDA. But the same crime is committed by a Malaysian found in that same

location. Surely, the law is not meant to categorise the offence according to the nationalities of the offenders! The 'in transit' plea in this case is to us irrelevant and a mere red herring to answer a charge under s. 39B DDA. This offence, we reiterate is complete once the appellant is on Malaysian soil. The appellant here knew he had to enter Malaysia to take a connecting flight to Phuket. This situation arose in the Singapore case of *Ng Kwok Chun & Anor v. PP* [1993] 1 SLR 55 where the Court of Appeal opined as follows:

> The statement of the second appellant was also quite clear. He said that: 'I merely pass by Singapore and intend to take a flight to Brussels.' This shows that he was aware that his flight from Phuket would take him to Singapore and from Singapore he would be taking a connecting flight to Brussels, which was his ultimate destination. He knew he was coming to Singapore although he intended to be here only on transit. There was, therefore, the requisite *mens rea*. He said that he did not know that by coming into Singapore in this manner he would be entering Singapore. That is really immaterial.
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> Accordingly, for the reasons given above, we dismissed the appeals and confirmed the sentences imposed by High Court.

[32] We hold that the 'in transit' defence in the nature as was held in *Tellon* should no longer be accepted as a valid defence for a charge of trafficking in dangerous drugs under s. 39B DDA. If this defence were accepted then incoming foreigners drug traffickers who stood before or at the immigration checkpoints at KLIA would be immuned from any criminal liability under s. 39B DDA, a situation not envisaged surely, when Part V DDA was promulgated.

[33] For these reasons, the appeal is dismissed and the conviction and sentence on the appellant are hereby confirmed.